SUPPLEMENTAL COMMENTS
OF THE HOULTON BAND OF MALISEET INDIANS
On
Delegation to Maine of the NPDES Program
8/21/00

In Federal Register Notices dated June 28 and August 4, 2000, EPA requested comments on whether EPA should delegate authority to the State of Maine to implement the Maine Pollutant Discharge elimination System (MEPDES) pursuant to Section 402 of the Clean Water Act over Indian lands and territories in the State of Maine.

The Houlton Band of Maliseet Indians (the "tribe," "Band" or "Maliseets") maintains that EPA delegation to the State of Maine of the federal Clean Water Act's NPDES program authority over the tribe's trust lands would

- violate the agency's trust responsibility to protect tribal cultural interests in Maliseet trust lands and natural resources,
- severely compromise jurisdictional rights that are secured to the tribe by the 1980 Maine Indian Claims Settlement Act, in violation of that Act.

For these reasons, the Band respectfully requests that EPA retain full responsibility for administration of the federal NPDES program with respect to Maliseet trust lands and resources.

I. The Tribal Status of the Houlton Band of Maliseets

The Houlton Band of Maliseet Indians is a federally recognized Indian tribe having trust lands in Aroostook County, Maine, including substantial trust holdings on one or both banks of the Meduxnekeag River, a tributary of the St. John River. Under applicable principles of Maine law, these trust holdings include title to the river bottom from each bank to the thread of the river, and riparian rights in the water itself. These trust lands and resources were acquired within the area long occupied by tribal ancestors of the current members of the Houlton Band, and the protection of these natural resources is culturally important to sustaining the cultural integrity of the Band.[1]

Comments dated April 7, 2000 by the Houlton Water Company claim the Band "has *no sovereignty* at all, because it is not one of the two tribes that were given authority over internal tribal matters as provided in 30 M.R.S.A. § 6206(1)," and in fact, that the Houlton Band "clearly is not an 'Indian Tribe.'as that term is defined in EPA's NPDES regulations." April 7 comments, at 1, 2. These conclusions are completely wrong. EPA

[1] In supporting adoption of the federal Settlement Act, the Maliseets' representative testified that the tribe sought "to establish a lasting land base to perpetuate its people and culture." Statement of Terry Polchies on behalf of the Houlton Band of Maliseet Indians, Hearings before the Senate Select Committee on Indian Affairs, July 1-2, 1980, at 439, 442. A copy of this statement is submitted as Attachment 1 to these comments.

would commit serious error if it accepted this distorted interpretation of the Settlement Act, or its corollary proposition that State jurisdiction over the Band and its natural resources is total and complete, for the reasons stated in prior comments and below.

In the 1980 Maine Indian Claims Settlement Act, over the objections of the State of Maine,[2] Congress gave federal recognition to the Houlton Band of Maliseet Indians, 25 U.S.C. §§ 1722(a), 1725(i), and made provision for the acquisition of trust lands for the benefit of the Band and its members. 25 U.S.C. § 1724(d). Both tribal recognition and provision for trust lands are inimical to the views expressed in the Houlton Water Company's comments.

A. Tribal Government

The Band's status as a recognized tribal government is expressed directly in the Settlement Act. Together with the Passamaquoddy and Penobscot tribes, "the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing *to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity.*" 25 U.S.C. § 1726(a). With the other Maine tribes, the Band is eligible for all federal Indian programs "to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians." 25 U.S.C. § 1725(i). To foster the survival of Maliseet tribal culture, express protection is given to Maliseet children under the Indian Child Welfare Act. 25 U.S.C. § 1727(e).[3] These provisions for exercise of the Band's own governmental authority reflect a congressional understanding of the retained powers of Indian tribes.

B. Inherent tribal sovereignty.

It is a legal principal beyond dispute that Indian tribes retain all aspects of their inherent sovereignty not withdrawn by Congress.

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [They] are a good deal more than "private, voluntary organizations." The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the

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[2] Maine Attorney General Richard Cohen testified that "[t]he Maliseets do not now exist as a tribe of Indians, nor have they existed as a tribe for many years.," and that the State "would find totally unacceptable any amendments which would grant special status to this group in any respect." Senate Hearings, *supra*, at 163. *See also* testimony of Attorney General Cohen at 167-68. (Attachment 2).

[3] ICWA declares "the policy of this Nation to promote the best interest of Indian children, and to promote the stability and security of Indian tribes and families by . . . the placement of [Indian] children in foster or adoptive homes which will reflect the unique values of Indian culture . . .." 25 U.S.C. § 1902.

> sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

U.S. v. Wheeler, 435 U.S. 313, 323 (1978) (citations omitted). The Houlton Band of Maliseets has neither ceded its inherent tribal sovereignty, nor has it been withdrawn by Congress in the Settlement Act or otherwise. It continues to be held by the Band.

C. Jurisdiction over Maliseet lands.

Ultimately, the Houlton Band joined the Settlement of the Maine Indian Land Claims too late to have worked out matters of relative jurisdiction with the State and Federal governments. Nevertheless, Congress was well aware of the Band's status as a tribal government, its immediate prospect of having a restored land base that would be protected for it in perpetuity, and of the Band's inherent authority "over their members and territory,"[4] which the Settlement did not limit or withdraw. The 1980 Maine Indian Claims Settlement Act does not expressly protect a right of the Houlton Band of Maliseet Indians to exercise reserved tribal sovereignty over their internal tribal matters, or in other respects. Neither does the Act terminate or foreclose those rights, however.

Instead, as it provided for the Band's most immediate needs through federal programs and trust land acquisition, the Settlement Act provided generally that

> the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members.

25 U.S.C. § 1725(e)(2). It is inconsistent with the plain language and purpose of the Settlement Act to argue that Congress intended that "the Houlton Band of Maliseet Indians and their lands will be wholly subject to the laws of the State," as the Houlton Water Company does.[5]

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[4] Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

[5] April 7, 2000 Comments, at 1, *quoting* a legislative "finding" in 30 M.R.S.A. § 6202. The understanding of Congress is reflected in the Section-by-Section analysis of the Maine Implementing Act, stating that "[a]s a 'Finding' or statement of 'Policy', this statement *does not constitute a substantive assertion of jurisdiction over the Maliseets*. It differs with S. 2829 in that the Federal legislation will extend *Federal recognition* to the Maliseets. In addition, S. 2829 will provide that Maliseet land must also be taken in trust once acquired with the consent of the Maine legislature, *which will entail exemptions from some state laws*." S.Rep. 96-457, 96th Cong. 2d Sess. (1980), at 35 (emphasis added); adopted by H.R. Rep. 96-1353, at 20.

To the contrary, the Settlement Act provision addressing State jurisdiction over Maliseet lands is *expressly qualified* as to trust lands,[6] *and* as to State jurisdiction generally. The general provision quoted above for the negotiation of general "jurisdiction of the State of Maine over lands . . . held in trust" for the Band is to have effect "[n]otwithstanding the provisions of subsection (a) of this section [1725]," which in turn is the sole federal pillar supporting the state jurisdiction provision in the Implementing Act upon which the State and the Water Company rely, 30 M.R.S.A. § 6204. Congress clearly intended that, for the Maliseets, the Settlement Act was not in any sense the end point, resolving issues of jurisdiction over the tribe and its lands, but merely the point of beginning. The reconciliation of the inherent tribal powers retained by the Band and the state jurisdiction authorized *pending agreement between the two* is yet to come.

As set forth below, EPA is compelled by its trust responsibility not to diminish or compromise this congressional reservation of jurisdictional rights in favor of the Houlton Band of Maliseet Indians.

D. Tribal "reservation"

The argument that the Houlton Band of Maliseet Indians is not an "Indian Tribe" demonstrates the absurd lengths to which the Houlton Water Company's comments will go in arguing that the Settlement Act terminated the Band's tribal status, rather than confirmed it. EPA's regulatory definition of "Indian Tribe" is written in broad terms to include "any Indian Tribe, band, group or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." 40 C.F.R. § 122.2. The keys are federal recognition and the exercise of governmental functions, which the Settlement Act provides, and the Band easily satisfies. The term "reservation" is not used as a proper noun, but to incorporate the conventional usage of the term described by the leading treatise on Indian law: "During the 1850's, the modern meaning of Indian reservation emerged, referring to all land set aside under federal protection for the residence of tribal Indians, regardless of [the reservation's] origin." Felix Cohen, Handbook of Federal Indian Law, (1982), at 34.

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[6] 25 U.S.C. § 1725(a) *excepting* § 1724(d)(4), in which the State is specifically precluded by Congress from negotiating "any other provisions regarding the enforcement or application of the laws of the State" in the anticipated agreements between the Band and the State concerning trust land acquisitions. There would be little point to this provision if the State were imbued with complete jurisdiction, or if Congress were not protecting the Band's inherent jurisdiction for direct discussion in negotiations under § 1725(e)(2).

By virtue of federal recognition and congressional provision for Maliseet trust lands, the Houlton Band of Maliseet Indians clearly qualifies as an Indian tribe under EPA's regulations.

I Delineation of Maliseet trust lands and resources

Accurate identification of the boundaries of Maliseet trust lands should not be subject to any dispute. All of the Band's trust lands are subject to detailed descriptions in deeds recorded in the Aroostook County Registry of Deeds and the Bureau of Indian Affairs office of land title registration. Copies of those deeds or other instruments "setting forth the location and boundaries of the land or natural resources" are required to be filed with the Maine Secretary of State under the terms of Pub.L. 99-566, section 4(d)(2).

_____NPDES licensee applicants and non-point source dischargers can readily determine their location relative to Maliseet trust lands by reference to the maps submitted with the Band's original comments.

III Trust responsibility for protection of Maliseet trust resources

With respect to the Settlement provision for the acquisition of trust lands for the Band and its members, 25 U.S.C. § 1724(d), the Senate Select Committee on Indian Affairs noted that § 1724(d)(4)

> requires negotiations between the Houlton Band of Maliseet Indians and the State which among other things will result in trust restrictions being placed on land to be acquired for the Band and this will necessarily entail some exception to the application of the laws of the State.

S. Rep. 96-957, 96th Cong., 2d Sess. (1980), at 26; *see also* H.R.Rep. 96-1353, 96th Cong., 2d Sess. (1980), at 20 (adopting Senate Report's section-by-section analysis.) At the same time, the Settlement Act itself provided that the lands acquired for the Houlton Band were protected by "immunity from taxation, financial encumbrances, or alienation without the consent of the United States [which] is the very essence of the trust character." 25 U.S.C. §§ 1724(d)4), (g); S.Rep., *supra*, at 24.

The clear import of the Congressional determination to grant the Band federal recognition as a tribe, and to acquire trust lands, is to make the Houlton Band the beneficiary of the federal trust responsibility owed generally to recognized Indian tribes, and particularly with respect to the lands and resources to be acquired for their benefit

under the Settlement Act. *See* Pub.L. 103-454 (1994), 108 Stat. 4791, 25 U.S.C. § 479a, note ("the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes."); 25 U.S.C. § 3601 ("the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes.") The Settlement Act's pre-ratification of the Band's negotiation of jurisdictional issues establishes a federal expectation that must be understood and preserved in the light of the trust responsibility.

Maine's assertion of complete jurisdiction over tribal trust lands treats the Maine tribes as though they had been terminated by Congress, divested of inherent tribal authority over their natural resources, and severed from the federal trust responsibility. Congressional intent to terminate the status of a federally recognized tribe is not a conclusion the courts will reach by inference: "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Mattz v. Arnett, 412 U.S. 481, 505 (1973). *Accord,* Pub.L. 103-454 (1994) ("Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated."); Seymour v. Superintendent, 368 U.S. 351, 355-56 (1962) (federal acts approving sale of mineral lands and opening tribal reservation lands to homestead settlement neither terminated the reservation "nor . . . lessen[ed] federal responsibility over the Indians having tribal rights on that reservation");

The entire thrust of the Settlement Act belies an intent to terminate the Band's tribal status. Indeed, in the first of several "special issues" addressed in its Report on the Settlement, the Senate Committee addressed the concern "that the settlement will terminate the three Maine tribes." Declaring the concern "unfounded," the Committee endorses the testimony of Interior Secretary Cecil Andrus that the Settlement Act does not terminate the Maine tribes, based in part upon their mere recognition as "tribes." S.Rep. 96-957, at 14; H.R.Rep. 96-1353, at 14 (same).

Equally significant, Congress expressed a firm conviction to enable the Maine tribes, including the Band, to maintain their tribal culture. The Act is structured to implement this promise by, among other things, providing for money, land and natural resources to be placed in a federal Trust, 25 U.S.C. § 1724(c), (d); providing protection against the diminishment of Tribal jurisdiction, § 1724(d)(4); and, by confirming the authority to tribal governments to preserve tribal culture and traditions, § 1726(a), (b). Addressing the tribal concern that "the Settlement will lead to acculturation of the Maine Indians" as another "Special Issue," the Senate Committee gave the tribes assurance that "[n]othing in the settlement provides for acculturaltion, not is it the intent of Congress to

disturb the cultural integrity of the Indian people of Maine." S.Rep., *supra*, at 17; *see also* H.R.Rep. 96-1353, *supra*, at 17. Elsewhere, the Senate Committee's confirmation that Maliseet trust lands are protected by inalienability provisions, "the very essence of the trust character,"is an assurance of the natural resource base that is the essential basis for the tribe's survival *as a tribe* in perpetuity.[7]

These federally secured resources and commitments to the core elements of federal Indian policy for the Maine tribes give purpose and substance to the federal trust responsibility.

It is neither necessary nor appropriate, however, for the trust responsibility to be defined in the terms of the Settlement Act alone. *See* United States v. Kagama, 118 U.S. 375 (1886) (upholding federal statute exercising jurisdiction over Indians and tribal lands on the basis of federal trust responsibility, independent of specific Constitutional grant.)[8] In subsequent cases, the federal courts have applied the Indian trust doctrine to executive branch agencies even when the obligation cannot be traced to a specific treaty or statute. Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); United States v. Creek Nation, 295 U.S. 103 (1935); Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252 (D.D.C. 1972).

Consequently, EPA has no lesser trust obligation to the protection of water quality in the Maliseet trust lands than it has with respect to the waters of the Passamaquoddy and Penobscot Indian territories.

The Federal Courts have made clear that federal substantive law applies, and protects, the Houlton Band of Maliseet Indians, even where state law might also be applicable. *See* Fellencer, *supra*, 164 F.3d at 711 n. 3; Shannon v. Houlton Band of Maliseet Indians, 54 F.Supp.2d 35, 40 (D.Me. 1999) ("the Court can discern no basis in the Implementing Act or in the Federal [Settlement] Act for distinguishing between the Penobscot Nation and the Band with respect to the applicability of *federal* law.") (emphasis in original). Without delegation to the State, the Clean Water Act applies to waters on Houlton Band trust lands *in parallel with* the State's water quality laws. The federal law, of course, must be administered in accordance with the federal government's general trust obligations to the Band and its resources; the state law quite obviously does not.

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[7] The historical conditions that form the backdrop to the Settlement Act were documented in a Report of the U.S. Commission on Civil Rights in the early 1970's described in other comments by the Band.

[8] Having been decided more than a century ago, the Supreme Court's language in Kagama is dated, but its understanding of the rationale supporting the Indian trust doctrine remains good law: "Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power." 118 U.S. 375, 383.

Under § 402(d)(2) of the Clean Water Act[9] as EPA and the courts have construed that provision, NPDES program delegation results in a loss of all substantive federal discretionary authority to act on individual NPDES permits. *See* 40 C.F.R. § 123.44(c) ("the Regional Administrator's objection to the issuance of a proposed permit *must be based on one or more of the following grounds:* . . ."); and, *e.g.*, Ford Motor Co. v. U.S. E.P.A, 567 F.2d 661(6th Cir. 1977) (agency policy derived from analogous Clean Water Act provision, and which "would undoubtedly be a good reason for publishing regulations or guidelines in the future" is inadequate legal basis for objection to State-proposed permit.) Neither the terms of § 402(d)(2) – confined to objections from another State or based upon EPA "guidelines or requirements" – nor the Agency's implementing regulation appears to leave EPA a residuum of post-delegation federal authority to exercise any discretion on a case-by-case basis over State-proposed permits.[10]

Ford Motor Company and similar cases applying § 402(d)(2) of the Water Act should not be extended to an exercise of the Agency's trust responsibility in a case where tribal resources were involved. There is nothing in the language of the Agency's own regulation, 40 C.F.R. § 123.44(c), however, to encourage that result. Under these circumstances, it is impossible for the Agency to justify a conclusion that program delegation as to tribal waters would not be an abdication of a significant part of its federal authority, and thus of its trust responsibility to the Maine tribes, including the Houlton Band of Maliseets.

IV. The Maliseets' right to negotiate jurisdiction over their trust lands

A Maine case, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), is clear authority for the proposition that the federal trust obligation to Indian tribes protects not just tribal property and tribal jurisdiction, but also a tribe's claim of such rights. In that case, the Justice Department was held to have a

[9] 33 U.S.C. § 1342(d)(2).

[10] In addition, the *inapplicability* of 40 C.F.R. § 122.49 to delegated State programs would appear to deprive the tribe of EPA's trust responsibility in the consideration of other federal laws in the NPDES permit process, including the National Historic Preservation Act, the Endangered Species Act, Executive Orders, and the National Environmental Policy Act (NEPA). The willingness of Congress or EPA to eliminate the consideration of such key federal laws in the context of a *general* NPDES delegation where no federal trust responsibility exists, is insufficient, in the absence of express congressional language, to apply the same policy to Indian trust lands.

fiduciary duty to actively assert the Maine tribes' claim of rights arising under a federal statute enacted to protect tribal property. *Id.*, at 379.

The 1980 Maine Indian Claims Settlement Act does not expressly protect a right of the Houlton Band of Maliseet Indians to exercise reserved tribal sovereignty over their internal tribal matters, or in other respects. Neither does the Act withdraw, limit or foreclose those rights, however. On the contrary, Congress provided that

> the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members.

25 U.S.C. § 1725(e)(2). *Pending such agreements*, the State was authorized to exercise "the civil and criminal jurisdiction of the State [over the Band, its members, lands and resources in Maine]. . . to the same extent as [over] any other person or land therein." § 1725(a).

The Settlement Act is a federal statute enacted for the benefit of the tribe, and therefore, as in Passamaquoddy Tribe v. Morton, protects tribal rights that have not yet been established, but which are nevertheless recognized. Here, the prospect of tribal jurisdiction over Maliseet trust lands is not only normal for federally recognized tribes, (and congressionally in Maine in the statutory protection of the substantial jurisdiction reserved to the Passamaquoddy and Penobscot tribes), but it was an issue expressly set aside by Congress in the context of the Maine Attorney General's testimony that the State had "indicated our willingness to discuss this matter [with the Band] in the future."[11] The inability of the tribe yet to achieve agreements with the State for the exercise of tribal jurisdiction in no way diminishes their continuing right to seek agreement, or the express congressional protection of that right.

As a practical matter, however, NPDES delegation with respect to Maliseet trust lands would resolve jurisdiction over water quality, an area of jurisdiction of great significance to the Band, by augmenting state jurisdiction with federal Clean Water Act authority, and simultaneously forfeiting federal administration of the law imbued with the federal trust responsibility. Delegation would thus change the field of tribal/state negotiation, altering the relative power of the parties to the detriment of the Band.

The Houlton Band does not agree with granting this additional jurisdiction to the State, and jurisdiction over Maliseet trust lands is not subject to alteration by the State, unilaterally, or by EPA. 25 U.S.C. § 1725(e)(2). "[T]he tribal relation may be dissolved and the national guardianship may be brought to an end; but it rests with Congress to

[11] Testimony of Maine Attorney General Richard Cohen, Senate Hearings, at 163.

determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial." United States v. Nice, 241 U.S. 591, 598 (1916). There is nothing in the Settlement Act to indicate a congressional intention to eliminate the federal "guardianship" of the Houlton Band of Maliseets. To the contrary, Congress has authorized the Band and the State, by agreement, to determine their respective jurisdiction over Maliseet trust lands, reserving, of course, the congressional prerogative to resolve such questions directly. The Clean Water Act does not give EPA the authority to do so.

For the foregoing reasons, EPA should deny Maine's application for NPDES delegation with respect to the waters of Maliseet trust lands.

from them something which they considered to be theirs of right. We respectfully request this Committee to make a careful analysis of the law enforcement responsibilities and the possible problems which could arise as the matter is covered in the Settlement Act. Note particularly that under Section 6206 of Section 1 General Powers, the Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to implement and administer those laws of the State of Maine that are applicable to the Indian territories. And note, also, under Section 6207 that by Subsection 1(a) the Passamaquoddy Tribe and the Penobscot Nation shall have exclusive authority within their respective Indian territories to promulgate and enact ordinances regulating hunting, trapping, and other taking of wild life. Yet, note by Subsection 6 of the same section in the Act, the Commissioner's powers of supervision may well be in conflict with the tribes' choice of ordinances for hunting, fishing and trapping. This area alone could easily become a nightmare and lead to considerable administrative difficulty and, perhaps, dangerous problems for law enforcement.

The undersigned feel that calling attention to a few points as above will indicate to this Committee that there are some very serious problems with respect to tribal and state relationships which have been unrealistically and perhaps ineffectively dealt with by the Settlement Act. Law enforcement is not an exercise which occurs in a vacuum. It is often and perhaps almost always fraught with emotion and some danger for the law enforcement officers themselves. In Maine, at least, the rights to hunt and fish and trap are widely considered to be inalienable rights by a large proportion of Maine citizens. Clearly, if Maine's Indians are given special, exclusive rights to hunt without limitation for sustenance purposes and non-Indians may not have the same rights, conflicts will begin to crop up. We respectfully request this Committee to make its own in-depth evaluation of the Settlement Act of the Maine Legislature. We think it raises more questions than it answers.

The undersigned—both of whom are active practitioners of law in the State of Maine of many years' standing, are avid hunters and fishermen and, for what it is worth, former members of the Maine State Legislature—believe that even though the so-called settlement was negotiated for many years, the Legislature was given little or no opportunity for in-depth study or review of the negotiations and their decisions and the reasons for them. We believe that most of the legislators voted on the basis of statements made to them as to the chaotic problems that would arise with respect to land titles, future mortgage commitments by banks, and the near impossibility of selling future municipal bonds. We believe that such tactics while presented perhaps by spokesmen who believe they were implicit in continued negotiations or the advent of active lawsuit, the statements themselves foreclosed the individual legislators from asking for the necessary time to think about the proposition and to review it at leisure.

Finally, we do not believe the scare stories because we believe as lawyers that there are court procedures to prevent such untoward freezing of land titles. As we stated above, the simplest way in which the matter could be handled to the satisfaction of nearly everyone except those members of the tribes who literally believe that they may have returned to them one half of the land in the State of Maine, is for Congress forthwith to extinguish all claims to land of all Indians in the State of Maine and to authorize suits to be brought in the United States courts of proper jurisdiction for the proof of and the award of money damages, if any be deemed appropriate by the courts, which said damages would be paid by the United States of America.

We earnestly submit these thoughts to your consideration, and we are grateful for the opportunity to be heard. We most earnestly request that you will read the documents listed above, and we feel very sure that if you do, you will become convinced as we are that history and the law will make it impossible for the Maine Indians to sustain these claims in any courts of this land.

PREPARED SATEMENT OF TERRY POLCHIES, AUTHORIZED REPRESENTATIVE, HOULTON BAND OF MALISEET INDIANS

Mr. Chairman and members of the Committee, I am Terry Polchies, authorized representative for the Houlton Band of Maliseet Indians. I appreciate the opportunity to submit this statement on S. 2829, a bill of overriding significance to the Houlton Band.

The Houlton Band supports the intent of S. 2829—to provide a just settlement of the Indian aboriginal land claims in Maine. The Houlton Band has agreed to extinguishment of its aboriginal land claim in Maine on two conditions: (1) that the Houlton Band be legislatively recognized as an Indian tribe by Congress and treated as eligible for all federal services and programs that benefit Indians: and (2) that a secure and permanent land base be held in trust for the Band by the United States. In its current form, S. 2829 fulfills only the first objective, but not the second—obtaining a secure and permanent tribal land base. The Band's support for S. 2829 is therefore conditioned upon the bill providing that the $900,000 be held in trust for the Band to purchase land that will be held in trust and restricted against alienation and will not be subject to State property taxes. The Band is agreeable to making payments in lieu of State taxes out of timber income it receives from the lands. But the lands should be exempted from levy and sale for failure to pay taxes. These minimal protections—already afforded the Passamaquoddy and Penobscot "Indian territory" lands under S. 2829—are needed to insure that the lands to be purchased for the Houlton Band by the United States will be more than a fleeting possession, will provide a permanent land base of enduring value for the Band.

History teaches that Indian tribes retain their lands only where those lands are exempt from levy for failure to pay property taxes and generally restricted against alienation (as by mortgage liens, judgment liens and the like). This is essentially what is meant by holding Indian lands "in trust". Without these protections, Indian lands become equivalent to fee lands. The difference is practical, not technical, for unrestricted fee lands rarely remain in Indian ownership for more than short periods of time. For example, the Puyallup Tribe in the State of Washington owned an 18,000 acre reservation in the late nineteenth century. When restrictions against alienation were removed by Congress and local property taxes authorized to be imposed, the lands quickly passed into non-Indian ownership. By the 1960's, the Indians owned only 22 acres. See generally *Puyallup Tribe* v. *Department of Game*, 433 U.S. 165 (1977). This example is illustrative of the experience of numerous western tribes.

Restrictions against alienation of Indian lands have been imposed by Congress since 1790. Without such restrictions, the expenditure of $900,000.00 of federal funds for lands for the Houlton Band will undoubtedly prove to be a waster gesture, as the lands will soon go out of tribal ownership and the benefit sought by the Band and the United States—a tribal land base—will be irrevocably lost. Specific language on how to provide the protections against alienation of land sought by the Band in S. 2829 is provided in Appendix A.

We understand that the Secretary of the Interior will submit a report embracing the essence of these changes, but providing that lands to be taken into trust for the Band must be consented to by appropriate State officials. Unlike the Passamaquoddy Tribe and Penobscot Nation, we have not identified existing lands in the area where we live that can be acquired. We have been assured by responsible leaders of the State that they will work with us to identify lands in the vicinity of our homes that are appropriate to be taken into trust status. We expect to be able to locate lands for acquisition based on the reasonable and good faith commitments of these officials, and can accept this change as a compromise modification to the bill. Since—unlike the Passamaquoddy Tribe and Penobscot Nation—the Band has no State reservation, it has greater need for lands near where its members live.

THE HOULTON BAND'S CLAIM

The land claim of the Houlton Band is set forth in some detail in a report prepared by our attorneys, Sonosky, Chambers & Sachse, 2030 M Street, Washington, D.C. 20036, entitled "Analysis of the Aboriginal Indian title of the Houlton Band of Maliseets" (November 9, 1979). A copy of that report is being submitted as Appendix B to this statement for inclusion in the Committee's hearing record on S. 2829. A summary of the claim follows:

It is well-documented that since at least the early seventeenth century, Maliseet Indians exclusively used and occupied the lands of the St. John River watershed which encompasses large areas in what is now Maine, Quebec and New Brunswick. Historical records left by early explorers and missionaries including Samuel de Champlain (1603), Pierre Bairde (1611) and Cadillac (1693) as well as numerous accounts from the eighteenth and nineteenth centuries identify Maliseet Indians throughout the watershed. Most ethnohistorians and anthropologists agree that Maliseet aboriginal territory included the entire St. John watershed. A map show-

ing this widely held consensus view of the Maliseet aboriginal homeland is found in the Smithsonian's Handbook of North American Indians, Vol. 15, p. 123 (a copy of which is attached as Appendix C to this statement). One study, by enthnologist Frank Speck, gives a more restrictive view—that only a portion of the watershed was included. But even Speck makes it clear that substantial portions of Aroostook County in northern Maine—over one million acres—were Maliseet aboriginal territory. Thus *all* scholars agree that the Maliseets held aboriginal title to vast areas in what is now Maine.

The Maliseets used these lands for hunting caribou and other animals, fishing, use of timber, gathering roots and raising maize and other crops. During the summer months they gathered in fortified communities. Throughout the rest of the year the Maliseets dispersed in small family bands to hunt. Each family band occupied a defined territory for hunting within the larger Maliseet territory.

This traditional pattern of Maliseet life continued in the St. John valley well into the nineteenth century. Aroostook County in northern Maine remained a sparsely settled frontier area until after the Civil War. Early in the nineteenth century Aroostook County attracted only a small number of settlers primarily for lumbering. But beginning in about 1870, with the advent of the potato-starch making industry, and the opening of railroad lines to major commercial centers, Aroostook County's settler population boomed as the area became sedentary and agrarian with vast acreages of potato farm. The County's non-Indian population grew from about 9,000 in 1840 to over 60,000 in 1900. The State encouraged this transformation of Aroostook County from a backwoods inhabited primarily by Maliseet Indians and a small number of loggers, to the more densely settled non-Indian potato farm country, by offering fertile land to settlers at bargain prices. Sizeable non-Indian communities arose in this period as the non-Indian farm population expanded.

These changes in Aroostook County had a severe impact on the Maliseet family hunting bands which had traditionally used land within Maine. As non-Indian settlement increased, game became increasingly scarce, with caribou becoming extinct in the area late in the century. Reliance on the traditional hunting and fishing subsistence economy became impossible. The Maliseet family hunting bands were forced into a more sedentary existence, farming and working for the settlers who had destroyed the Maliseet way of life. Many settled near Houlton, a traditional camping area and a central nexus in the rivers for the Maliseet canoeists.

The Houlton Band today is comprised of lineal descendants of the Maliseet family hunting bands which traditionally hunted in Maine. It is the only Band of Maliseets in the United States. The Houlton Band had always retained its Indian identity. Its members today have large degrees of Indian blood and speak Indian language. The Band's organization remains as it was in aboriginal times—along kinship lines. The Band is the successor land-owning entity to the Maliseets family hunting bands which used aboriginal lands in Maine.

The aboriginal claim of the Maliseets to the lands its members exclusively used and occupied in Maine has never been lost. Congress has never extinguished Maliseet title. Nor were there any treaties with the State which could even purport to remove the Maliseet's aboriginal lands in Maine. Furthermore, the Maliseets never voluntarily left their lands. Instead, the Maliseets were involuntarily forced to change their way of life as non-Indian settlers—without federal authorization—increasingly destroyed the Maliseets' subsistence economy. Since the forcible exclusion of Indians from aboriginal lands even by federal officers cannot extinguish Indian title, it follows *a fortiori* that non-Indian settlers encroaching on Indian lands and excluding the Indians cannot extinguish aboriginal title.

Since the Maliseets' aboriginal title in northern Maine has never been abandoned or extinguished, it remains valid today. The Houlton Band, as the land-owning entity, believes that settlement of its land claim through legislation would best serve the interests of the Band and its members, as well as the non-Indian people of Maine and the Nation. But such a settlement must provide more than temporary benefits to be acceptable to the Houlton Band.

S. 2829. The Houlton Band now has 350 members. The Band's members are for the most part at the poorest end of the economic spectrum, living in substandard housing and without adequate health care. (Article from "Indian Truth" attached as Appendix D to this statement.) Even by Indian standards, living conditions among the Houlton Band are generally appalling. For example, in 1971, the per capita income of Indians in Aroostook County was about $600.00 and only about 9% of the Indian families in Aroostook County have an income

above the poverty level. State Indian services to Houlton Band members have been minimal and federal services nonexistent. The Band looks to S. 2829 as a ray of hope for improving the economic plight of its members and, just as important, to establish a lasting land base to perpetuate its people and culture.

The Band agrees with Secretary Andrus that certain other provisions in the bill require additional clarification. Some of the needed changes are technical only, and we have appreciated the opportunity to meet in the past weeks with the staff of this Committee, the other tribes, representatives of Secretary Andrus and the State to produce clarifying language agreeable to all interested parties. The Houlton Band remains particularly concerned with the applicability of the Indian Child Welfare Act to its members and protecting the Band's authority over its internal tribal affairs. The severity of the Indian child welfare problem among the Houlton Band was documented by the Final Report of the Indian Policy Review Commission, Task Force Four: Federal, State and Tribal Jurisdiction, p. 205, which stated that "[i]n Aroostook County in 1972 Indian children were placed in foster homes at a rate of 62.4 times (6,240 percent) greater than the State-wide rate for non-Indians." Most child placements of Houlton Band members are in non-Indian homes. This intolerable situation was brought to the attention of this committee during consideration of the Indian Child Welfare Act. Hearings before the Senate Select Committee on Indian Affairs 95th Cong., 1st Sess. on S. 1214, the Indian Child Welfare Act of 1977, pp. 343–349. The Houlton Band, perhaps more than any other Indian tribe in the country, needs to have the protection of the Act to ensure that state institutions do not continue this pattern of placing a disproportionate number of the Band's children in non-Indian homes. This first objective is easily secured by the following addition to Section 7:

In Section 7, add "and/or Houlton Band of Maliseet Indians" after "Penobscot Nation" whenever those words appear in the section; and add "or Band" after "or Nation" in subsection 7(a).

In addition, we strongly support addition of a new section to the bill recognizing the authority of the Houlton Band to organize its government and adopt a constitution and business charter. We believe that the Indian Reorganization Act of 1934 (25 U.S.C. 461 *et seq.*) applies to the Band and to other tribes in Maine. This should be confirmed in the legislation.

Finally, we are informed by the Interior Department that their report will propose an amendment to the bill that members of the Band who are not American citizens would not be eligible for federal services or benefits as members of the Band. We understand the Department's concern is that large numbers of Canadian Maliseets might seek membership in the Band, and we are sympathetic to this issue. However, Interior's concern can be met by providing that persons not on the current Band membership roll must be American citizens to be eligible for federal services or benefit as Band members. We are attaching the Band's membership roll as Appendix E. A small minority of our present members are not American citizens. Although they have lived in the United States for years, usually decades, these members have not become citizens. Rather, they have lived in Houlton in exercise of their rights under the Jay Treaty, which provides that Indians on either side of the United States-Canadian border shall have the right to free access to both sides of the border, without regard to their citizenship. They should not be penalized for exercising their Jay Treaty rights by being stricken from the Band's roll.

Thank you for the opportunity to present this testimony.

understand there are many competing demands on the budget and that you have an obligation to balance numerous competing interests. However, I have pledged to the tribes that I would support their request for a $27 million trust fund and a 300,000-acre land base; and, consistent with that pledge, I would ask you to give careful consideration to these figures.

Finally, I should offer one final comment about the claim of the so-called Maliseet Band of Indians, since, if they have not already done so, they may request certain amendments to the bill to provide them with an exemption from State taxes, with certain limited sovereign immunity and with restraint on alienation of any land acquired by them. Recently this Indian group has asserted a claim to areas in northern Maine similar to that of the Passamaquoddies and Penobscots. The basis of their claim is, in my judgment, not meritorious. The Maliseets do not now exist as a tribe of Indians, nor have they existed as a tribe for many years. Accordingly, they cannot even meet the threshold test of the Trade and Intercourse Act.

Senator COHEN. Why are they included in this particular proposal?

Mr. COHEN. Out of the moneys that have been decided upon between the Passamaquoddies and the Penobscots, they have entered into an arrangement as to a portion of their moneys. That is something that we were not involved in that we do not object to. They could, I suppose, cause extended controversy in having this matter go on further in arguing over a variety of their claims. But that is why they are included; because of a specific agreement negotiated between the two other tribes and themselves to which the State was not a party.

The vast majority of Maliseets reside not in Maine but in Canada. For that reason the State has been unwilling to make any jurisdictional concessions to the Maliseets. The Interior Department does not even recognize them as a tribe or band, and we would find totally unacceptable any amendments which would grant special status to this group in any respect. While we have indicated to them our willingness to discuss this matter in the future, we do not think it appropriate that Congress grant them special rights and exemptions from State laws without specific State consent.

I have endeavored to set out for you the reasons why I strongly believe this settlement is both necessary and just. Before I conclude, however, I would ask that you consider this problem from another perspective which is neither strictly legal nor economic in nature. That perspective concerns the human relationship between Indians and non-Indians in the State of Maine.

If this case proceeds to litigation, there will be no winners. Even if the State were to successfully defend against the entire claim, a result about which there is reason, certainly, to have some doubts, the litigation alone would have catastrophic consequences. One seemingly inevitable result would be a legacy of bitterness between Indians and non-Indians which might take generations to overcome.

By contrast, the settlement before you is the result of a good-faith effort by both the State and the tribes to effect a reasonable resolution of their differences. I will not pretend that it was 13 months of amicable negotiations. There were indeed times when voices were raised, when threats were made, and when the prevailing mood was certainly

one of frustration. Nevertheless, even during the periods of greatest difficulty, both sides always returned to the table. The wisdom of resolving this matter short of war, albeit one fought in the courtroom, ultimately prevailed.

I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship, in my view there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine. I can also tell you that if this matter is litigated over a period of years, the atmosphere in Maine certainly will be quite different.

I cannot put a price tag on human relationships, nor am I suggesting that this factor alone justifies enactment of the legislation before you. I am asking only that you give appropriate consideration to the historical significance not only of the settlement itself, but also of the manner in which it was reached.

Thank you very much, Mr. Chairman.

Senator COHEN. Thank you, Mr. Attorney General. Let me ask you a couple of questions.

What is the level of spending currently in the fiscal 1980 budget for the State of Maine for the tribes?

Mr. COHEN. It is $1.7 million, Senator—there is no budget right now. It would depend, I think, on what happened in Congress and what the level of Federal spending is through Interior as to the current recognition of the tribes.

Senator COHEN. You indicated you contemplated no reduction in the level of services. I was not clear on that point.

Mr. COHEN. No, I did not say there would be no reduction. I said there still would be obligation on the part of the State to provide things such as ADC and a variety of other programs.

Senator COHEN. Mr. Attorney General, let me ask you some questions about the Maine Implementing Act. It creates two kinds of Indian lands: Indian territory and Indian reservations. From my reading of this particular act, I have concluded that this distinction is for the purpose of distinguishing those areas where the tribes may assert criminal jurisdiction for class E crimes—juvenile offenses and so on—from those areas where it cannot. Is that the basis for the distinction?

Mr. COHEN. That is certainly one of the distinctions. The things that you mention, such as criminal jurisdiction, the tribal courts apply on the current reservations as contrasted to the newly acquired lands and how large they might be.

Senator COHEN. The tribes are empowered under the settlement to establish tribal forums where they can try those cases which fall under their jurisdiction. Some people have objected to this particular arrangement as being unworkable in that a decision whether a crime is a class E crime and within the tribes' jurisdiction or a class D crime, which is outside of the tribes' jurisdiction, would rest with the discretion of the prosecutor. Do you see any difficulties in drawing a distinction?

Mr. COHEN. I do not see, Mr. Chairman, any difficulty in that. The fact of the matter is——

Senator COHEN. Let me give you an example. If, for example, the State wants to assert jurisdiction by saying they are going to try this

on a class D basis—if you were to reduce it down to a class E crime, would that then turn the jurisdiction over to the tribe? Would there be some competition between the tribes seeking to assert jurisdiction in that case where you have discretion as to whether you call it class D or class E?

Mr. COHEN. There is a possibility in certain situations, depending on the factual situation of concurrent jurisdiction. In other situations I could see where you might have a jeopardy situation to preclude one jurisdiction from taking action.

We discussed this at great length during the negotiations and consulted prosecutors and what have you. I really do not see a problem as far as competition or anything such as that. I do not see that as a practical problem.

The point I wanted to make, Mr. Chairman—of course currently, today, the State of Maine has no jurisdiction whatsoever to prosecute criminal offenses on any of the currently held Indian lands.

Senator COHEN. Is there any question that a class E crime committed by two Maine Indians on, let's say, Route 1 in the Indian Township—would that fall within the State's jurisdiction or the tribes'?

Mr. COHEN. Yes, Route 1 is entirely within the State's jurisdiction.

Senator COHEN. In section 6208(3) of the Maine Implementing Act it is provided that the Maine tribes, when acting in their "business capacity," will be subject to the laws of the State of Maine governing corporations and also be subject to taxation as such. Do you anticipate any difficulty in distinguishing between when the tribes are actually engaged in a business activity and when they are acting in a tribal capacity?

Mr. COHEN. I do not believe so. The same criteria would be used as when a government entity is working in a proprietary capacity. We discussed utilizing the same criteria.

Senator COHEN. You would use the same criteria that we now use as far as the Government acting in its own proprietary capacity?

Mr. COHEN. That is correct.

Senator COHEN. In the Federal legislation at section 6(d), the Congress gives its consent, in advance, for any amendment to the Maine Implementing Act which is made with the consent of the tribes. What kinds of amendments do you anticipate Congress is giving its consent to?

Mr. COHEN. As far as the Maine Implementing Act is concerned?

Senator COHEN. Yes.

Mr. COHEN. We had nothing specific in mind at this time——

Senator COHEN. Congress is going to want to know what kind of amendment——

Mr. COHEN. We talked about depending on how criminal jurisdiction works out or does not work out, and whether there could be a possible alteration as far as that goes, things of that type. We were just trying to create a mechanism that was workable and that could be effectuated.

Senator COHEN. But you are asking Congress in advance to give consent to amendments that may be offered at some time in the future by the State. I am just trying to find out what kind of amendments you are going to ask Congress for consent on.

Mr. COHEN. It would only be to local relationships that affect the Indians and the State of Maine, specifically. They would not directly affect or have an impact on, certainly, the Federal Government.

Senator COHEN. Perhaps you could spell that out a little more specifically for the record because that question will be raised by many of our colleagues.

Mr. COHEN. I will certainly do that.

Senator COHEN. Thank you. Without objection, the record will remain open for the purpose of inserting this additional information upon receipt.

[See letter dated August 8, 1980, from U.S. Department of the Interior, p. 95.]

Senator COHEN [continuing]. The Federal act, at section 6(b) provides, among other things, that the Maine Implementing Act shall not be subject to 25 U.S.C. 1919. That section of the United States Code permits the States and Indian tribes to enter into agreements regarding the care and custody of Indian children. Am I correct in concluding that you do not feel this provision is necessary because it would have duplicated section 6209(D) of the Maine Implementing Act?

Mr. COHEN. That is correct.

Senator COHEN. Is that the rationale for that?

Mr. COHEN. That is correct.

Senator COHEN. Mr. Cohen, we have received a letter in which it was asserted that the proposed settlement would leave some title problems unresolved because of the continuing controversy in Maine over the public lots. Could you tell us to what degree this controversy affects the land under consideration for transfer to the Maine tribes?

Mr. COHEN. There is a very small portion of acreage of public lots that are involved in any of the lands that are currently under consideration as far as the 300,000 acres are concerned. Wherever they are involved, of course, the grass and timber rights would be transferred. There is a current case pending in the State of Maine as to the ownership of the public lots and depending on how that case is decided would impact as to the public lots involved here.

Senator COHEN. How long do you anticipate the resolution of that particular litigation or controversy is going to last?

Mr. COHEN. It has been orally argued in the Maine Supreme Court and is pending a decision right at the moment.

Senator COHEN. You don't propose going forward until that is resolved, finally?

Mr. COHEN. No; if the State prevails in that particular case, the State would get back the grass and timber rights. If not, they will go on and people can sell them. So it will have no—as far as I see it—direct impact as far as needing any alterations to the settlement is concerned.

Senator COHEN. In their claims against the State of Maine, the tribes have asserted that their aboriginal title to the land was not properly extinguished by Congress. According to the U.S. Supreme Court decision in *Fletcher* v. *Peck*, the Thirteen Original States differ from the Western States in that, aboriginal title notwithstanding, the fee title to the land lies with the State. Do you agree that applies here?

Mr. COHEN. Yes.

Senator COHEN. If you follow that logically, aboriginal title has been described as a possessory interest alone and not an ownership right. It was characterized in a recent law review article as an "encumbrance on those lands in the nature of a life estate for the tribe's use and occupancy."

If the Maine tribes were to win their case in court, is this not the title to which they would succeed?

Mr. COHEN. I have not read that article, but I understand it is in the nature of possessory interest and not fee simple.

Senator COHEN. In other words, the fee simple title would still reside with the State?

Mr. COHEN. Yes; right; but for practical purposes, at least as I look at it, I think it would in effect be fee simple.

Senator COHEN. In other words, it is a possessory life estate that you would say is equivalent, for practical purposes in this case, to a fee title?

Mr. COHEN. As far as affecting current landowners, businesses that are involved, municipalities, yes. That would be my feeling.

Senator COHEN. In section 4(a) (2) and (3) of the Federal legislation, the bill approves and ratifies all transfers of land or other natural resources as of the date they were made. This provision also states that those transfers will be deemed by the Congress to have been made in accordance with Maine State laws. The question I have is this: Why is it important that the Congress express an opinion on transfers that have occurred solely under the color of State law?

Mr. COHEN. I will have Mr. Paterson comment on that.

Mr. PATERSON. We were concerned that despite the fact Congress might extinguish any claim that existed under Federal law, since the U.S. Government would still have a continuing trust relationship with the tribes, they might very well be entitled in the future to bring a claim on their behalf under State—either statutory or common-law theory.

We therefore wanted to make certain that any claim on behalf of these tribes which arose under State law was similarly extinguished.

Senator COHEN. Let me turn now to the Maliseet question. Has the land which would make up that 5,000 acres to be held by the Maliseets been determined as of this time?

Mr. COHEN. Not to my understanding. It is my understanding that they are going to get enough money to purchase the requisite number of acres. I do not know whether or not there has been any agreement arrived at specifically.

Senator COHEN. What is going to be the status of that land? Let's suppose, for example, that there is a nonpayment or default of payment of taxes; what happens? What is the mechanism at that point?

Mr. COHEN. It would be absolutely similar to any other private property in the State of Maine, and it would be subject to foreclosure.

Senator COHEN. And taken by the State?

Mr. COHEN. Yes.

Senator COHEN. Since you are using Federal funds to, in essence, purchase the 5,000 acres, do you think that under those circumstances the default that would then allow the land to revert to or be taken by the State is appropriate?

Mr. COHEN. I think it is appropriate, yes. I do not think there should be any special considerations given here as far as to the United

States, not only in my remarks, but in other documents that were provided to the committee. I think that is the case with the small amount of land that is involved, given the United States creating this whole situation, as far as Maine is concerned, many years ago. I think, under the circumstances of trying to balance the interest, that is the best and most fair at which one could arrive.

Senator COHEN. I take it from your testimony that you do not really think the Maliseets qualify for relief under this particular bill, (1) because they are not a tribe, not a recognized tribe as such as the Passamaquoddies and Penobscots, and (2) because their case is thin or marginal at best. Nonetheless, since the Penobscots and the Passamaquoddies have entered into their separate arrangement with them, as far as you are concerned, you have no objection. Is that the basis for the settlement?

Mr. COHEN. That is correct.

Senator COHEN. If the Federal Government were to include that, since they are using Federal dollars to purchase this land, there should be some nature of a trust relationship with the Maliseets, would that endanger this particular settlement, in your opinion?

Mr. COHEN. I believe that it could seriously jeopardize the entire proposed settlement. It would have to go back, certainly, to the Maine legislators.

Senator COHEN. You mentioned that this settlement is not proposed as a model to be used elsewhere. The fact of the matter is, it will be used as a model elsewhere, where we have other disputed claims that will be coming before the Congress. They will point to the Maine settlement as a precedent saying, "Look what you have achieved here with a full Federal responsibility. We would like the same."

So, it will be pointed to for precedential impact. Second, you obviously intend to have it be used as a precedent because you have a unique situation in which you treat the tribes as municipalities. You want that as a model, do you not?

Mr. COHEN. I do not propose it as a precedent, but I think it could well be used. I agree. I think it is a unique and novel way or relationship, and I think it is something to be looked at by other States and by Congress.

Senator COHEN. But it is so unique that it may cost the Federal Treasury $300 million.

Mr. COHEN. I am not sure that is the case. I see that portion just as Secretary Andrus was talking about; I think that should be analyzed.

Senator COHEN. But, if they come to the conclusion that, because of treating them as municipalities it will deal with tens, if not hundreds of other laws affecting municipalities, from revenue sharing to CETA programs and other types of intergovernmental relationships; if we find that this one situation is an exception, a unique innovation as such, setting a model for the others to follow, which is going to cost the Federal Treasury considerably more than the $81.5 million, and they were to come back and say that they cannot agree with that unique concept, that they are agreeing to full Federal responsibility for these claims to the tune of $81.5 million, but that they were certainly in no position to open up the Federal Treasury to unforeseen or at least reasonably foreseeable contingent requests made upon the Federal Treasury which will cost hundreds of millions of dollars; in that case,